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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 246

PAUL W. DIEHL, JR.,
Petitioner,

v.

LEHIGH VALLEY RAILROAD CO. ET AL.,
Respondents

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court granting defendants' motions to dismiss the complaint (R. 35a) is reported at 22 CCH Labor Cases, § 67,375. The opinion of the Court of Appeals affirming the judgment of the District Court (R. 53) is reported at 211 F. 2d 95.

Jurisdiction

The judgment of the Court of Appeals was entered on March 3, 1954 (R. 60). This Court extended to July 31, 1954 the time for filing the petition (R. 61), and it was filed July 29, 1954. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statute Involved

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, 50 U. S. C. App. 308, are set forth in the Appendix.

Question Presented

Whether the "continuous employment" standard (which this Court has said the statute establishes) permits a veteran, who after returning from military service met a qualification test for promotion (from which seniority dated in the higher job), to be passed in seniority standing by those previously junior to him who because they remained continuously employed were able to meet the test during his absence but after the date he would have met it had military service not interrupted his employment.

Statement

This action was brought under Section 8 of the Selective Training and Service Act of 1940, as amended, by a veteran, reinstated in his former employment, to compel his employer to place him in the seniority position he would have occupied had military service not interrupted his civilian employment. (R. 3a-6a). The collective bargaining agent for the employees (including the veteran), System Federation No. 96 of the Railway Employees' Department, A. F. of L. (hereafter called "the union"), and the non-veteran employees affected intervened as defendants. (R. 26a). Defendants filed no answers, but moved to dismiss the complaint. (R. 7a-27a). The district court's judgment dismissing the complaint (R. 35a) was affirmed by the court below. (R. 53).

When plaintiff entered the armed forces, on April 15, 1953, he was working as a "set-up" carman mechanic, or inspector, i. e. he was a carman helper who had been as-

signed the duties of a carman but was not yet fully qualified to be a carman. (R. 10a, 25a). This up-grading of helpers was required by the wartime shortage of carmen. (R. 10a). The positions of carman helper, "set up" carman, and carman are within the same craft and at all times were governed by the same collective bargaining agreements. (R. 10a-23a). These "set-up" carmen who completed 1160 days of work at carmen's duties were promoted to carmen; the order in which they completed the 1160 days of works determined their seniority order as carmen.[1] (R. 16a-20a). This seniority order in turn governs certain preferences in their employment, such as order of layoffs and recall to work.

Plaintiff Diehl was honorably discharged from military service and duly returned to his employment with the railroad as a "set up" carman. Subsequently, on January 10, 1949, he completed the 1160 days of work. (R. 5a). If he had continued on the job, without interruption for military service, he would have completed the 1160 days on June 1, 1946. (R. 6a). Four non-veterans who had begun work as upgraded carmen later than Diehl continued working during his absence in military service and thus were able to complete the 1160 days prior to January 10, 1949, the date Diehl completed the requirement, but after June

[1] By mutual consent of the union and railroad, the disposition of seniority for "set-up" mechanics in the carmen and other crafts was deferred until after the war. (R. 15a) The agreement establishing this seniority was finally entered into between the union and railroad on March 1, 1949. (R. 16a-20a) Under it, those (including Diehl and the non-veterans involved here) completing the 1160 days before March 1, 1949 were all given seniority dates, as carmen, of March 1, 1949; however, among those with this date, their seniority rank relative to each other was the order in which they completed the 1160 days. The "set-up" carmen were not required to accept the promotion to carmen; if they did, they lost seniority as helpers (R. 17a); if they did not, they dropped back to helper positions. (R. 19a) The 1160 days' work required for promotion of "set up" carmen was comparable to the four years' experience usually required for advancement to carmen. (R. 12a)

1, 1946, when he would have completed it but for his absence. (R. 31a). These non-veterans were therefore ahead of Diehl on the carmen's seniority roster, (R. 5a) and enjoyed an advantage over him in those terms and conditions of their employment which are governed by seniority. (R. 33a-34a). Accordingly, Diehl brought this action under the statute to require the employer to place him on the roster ahead of these employees.

As the District Court stated, there is "no substantial issue of fact" in this situation. (R. 35a). Plaintiff moved for summary judgment (R. 29a) but the court granted defendants' motions to dismiss, on the ground that "to restore or compensate or give the equivalent of lost opportunities is something which the law wisely does not attempt". (R. 38a). The court below affirmed, on the ground that, since non-veterans on leave of absence for the time Diehl was in military service would not have achieved the seniority standing he claimed, he was not entitled to it; the court recognized that "if we apply literally the test [of "continuous employment"] supplied by *Oakley* [v. *Louisville & N. R. Co.*, 338 U. S. 278] we must advance Diehl above the four individual appellees," but regarded the statutory clause "shall be considered as having been on furlough or leave of absence" (Section 8(c)) as conflicting with this test; concluding that "we cannot reconcile the irreconcilable," the court rejected *Oakley* and held the leave of absence clause controlling. (R. 58-59).

Summary of Argument

This Court has repeatedly held that the Act entitles the veteran to the position which he would have obtained had he remained "continuously employed" rather than absent in military service. A collective bargaining agreement cannot override this principle by fixing seniority rank in the

order of qualification for promotion, where non-veterans formerly junior to the veteran were able to qualify earlier than he, and so pass him on the seniority roster, only because he was absent in military service. *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, is similar to the present case in all material respects and is controlling here. After the veteran completes the qualification for promotion following his return from military service, he must be given seniority rank ahead of such non-veterans.

That persons on non-military leaves of absence are not so advanced is immaterial to the veteran's right. The statute is not satisfied by merely treating the veteran equally with those on (in the statutory language) "leave of absence," where the "continuous employment" standard would give him more. Such conclusion tears from its context a single clause in the Act and considers it separately and alone to define and limit the entire scope of the Act, contrary to *Oakley* and *Trailmobile Co.* v. *Whirls*, 331 U. S. 40. Both the structure and language of Section 8(c) of the Act show that its several clauses are to be read, not as mutually limiting one another, but as cumulatively conferring on the veteran all the advantages they mention. This is especially true of the "leave of absence" clause, which was added to the Act at the end of its legislative course, as a means of giving the veterans additional protection. Since then, Congress has explicitly approved the "escalator" or "continuous employment" interpretation of the Act adopted by this Court. Thus it is no defense to the veteran's claim to assert, as did the court below, that he was treated equally with those on "leave of absence."

ARGUMENT

I

The "Continuous Employment" Standard (Which This Court Has Said the Statute Establishes) Does Not Permit a Veteran, Whose Absence in Military Service Delayed His Fulfillment of a Qualification Test for Promotion (From Which Seniority Dated in the Higher Job) and Who Met the Test After Returning From Military Service, to be Passed in Seniority Standing by Those Previously Junior to Him Who Because They Remained Continuously Employed Were Able to Meet the Test Earlier Than He Did But After the Date He Would Have Met It Had Military Service Not Interrupted His Employment.

A cardinal principle of the Act is to insure that no veteran should, by reason of having been required to leave his job and serve his country, lose ground in his employment as compared to those who remained behind. That is to say, the veteran is entitled *nunc pro tunc* to what in fact he would have obtained had he not been absent in military service. This principle has been emphasized by this Court in every case which has come here, and is dispositive of this case.

In the present case, the issue is whether a collective bargaining agreement can override this principle by fixing seniority rank in the order of qualification for promotion, where the non-veterans were able to qualify earlier than the veteran, and so pass him on the roster, only because he was absent in military service.

The controlling principle, variously called the "escalator" or "continuous employment" rule, was first laid down in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275. The veteran was held not entitled to a position on the seniority roster ahead of all non-veterans ("super-seniority") because he would not have achieved such a position

had he remained continuously employed. The reason for this, said the court, was that "The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (328 U. S. at 284). And further, "Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." (328 U. S. at 284-5).

And so it has been in each succeeding case. In *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, placing a veteran, along with all other employees of a merged company, in seniority positions below all employees of the merging company did not violate the statute because the veteran's absence in military service in no way contributed to this result,—the veteran was kept "in the same situation as if he had not gone to war but had remained continuously employed." (331 U. S. at 58). In *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, a collective bargaining agreement placing shop stewards at the top of the seniority roster was held not to be an invalid discrimination against returning veterans who had previously been ahead of the stewards on the roster, because had the veterans remained continuously employed the shop stewards would still have been placed ahead of them; the Act required no more, and no less, than that the veteran be treated as "uninterruptedly a member of the working force." (337 U. S. at 526). And most recently, in *Huffman* v. *Ford Motor Co.*, 345 U. S. 330, it was held that to allow newly-hired employees seniority credit for time spent in military service, and thereby to place a returning veteran in a lower position on the seniority list, does not violate the statutes because the returning veteran's loss of ground, being unconnected with his military service, was not discriminatory or hostile toward returning veterans. Thus the

"escalator" or "continuous employment" principle is not dicta, but the *ratio decidendi* of every one of these cases.

But though these decisions make the principle clear and its application plain enough, the case which is even more obviously controlling here is *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278. For the situation of the veterans Oakley and Haynes there was identical to that of Diehl here. Haynes' complaint alleged that while he was in military service, six persons in his job classification junior to him in seniority were promoted to a higher classification, to which he would have been eligible on the basis of seniority had he not been absent. And Oakley, the other veteran, alleged that had he not been in military service when the repair shop at which he worked was closed, he would have been transferred to another shop, with seniority at the new shop as of the date of such transfer. This Court held that both complaints "stated, in effect, that the complainants had not been restored to the place to which they were entitled on the escalators of their respective civilian employments." 338 U. S. at 284.

Like Oakley and Haynes, Diehl alleges that had he not been absent in military service he would have received a different and better position, a higher place on the seniority roster. And it was failure to accord the veterans this which in *Oakley* this Court held amounted to a violation of the Act.

Oakley also specifically repudiated the argument renewed here, that the statute is satisfied if the veteran is simply given his old job, because he then has received his "former position." The argument ignores the fact that the "terms and conditions" of the veteran's former position include whatever right or opportunity exists to advance to another job. Accordingly, it was rejected because (338 U. S. at 283):

> An honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to

> the position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather a position which, on the moving escalator of terms and conditions affecting that particular employment would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

The non-veterans here were able to move ahead of Diehl on the seniority roster only because of Diehl's absence in military service. Diehl has, since returning from military service, met all work or experience requirements and has established his qualification for the higher job in precisely the same way as did the non-veterans. And it is agreed that, had military service not interrupted his employment, he would have done so prior to the time the non-veterans did, and would accordingly have been placed on the seniority roster ahead of them. (R. 6a, 31a).[2] The collective bargaining agreement, however, established seniority rank in the higher job in the order the qualification test was met, i.e. placed Diehl behind the non-veterans. The issue here is simply whether such a provision is valid and controlling as to returning veterans. And it is abundantly clear from every one of this Court's decisions that it is not.

For it is at this point that the Act cuts across the bargaining agreement, to add to it the requirement that the veteran must be placed in the position he would have had, had he remained continuously employed. In giving him less, the agreement here inherently discriminates against the veteran, even though by its terms it applies alike to veterans and non-veterans, and even though no hostility to veterans may have motivated it. Only the "escalator" or "continuous

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[2] This removes from the present case the further defense asserted in *Oakley*, that the veteran lacked the necessary experience on the job and had failed to meet other requirements for promotion. Since that case arose on dismissal of the complaint, the defense was not considered there. See footnote 2 to the opinion, 338 U.S. at 280.

employment" principle can shield the veteran from this loss. In its application here, it requires that Diehl, after qualifying for promotion, be considered to have qualified *nunc pro tunc*, with his seniority accordingly made retroactive to the date he would have qualified but for his absence in military service.[3]

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[3] Such a reading together of the provisions of collective bargaining agreements and those of the Act has been found desirable and workable by many of the major railroads in the country, which have dealt with this situation in exactly the manner which appellants ask the employer to do here. As an example, the New York Central system provides in its bargaining provision covering apprenticeship ("Memorandum of Understanding Relative to Rules of the Shop Crafts Hereinafter Listed," between New York Central and other roads, and System Federation 103 representing crafts here involved):

> An apprentice who, subsequent to May 1, 1940, entered the armed forces of the United States; whose reemployment rights are protected by the Service Extension Act of 1941; who returns to the railroad company's service within the specified period of forty (40) days; and who thereafter resumes and completes his apprenticeship shall, upon completion of apprenticeship, be given the same seniority date as mechanic that he would have obtained if there had been no such interruption in apprenticeship.
>
> *Example.*—Apprentice A began apprenticeship December 1, 1939; was inducted into the U. S. Army December 1, 1941; resumes apprenticeship December 1, 1943; completes apprenticeship December 1, 1945; will be given dating as mechanic December 1, 1942.
>
> *Exception.*—On the Michigan Central no apprentice will be given hereunder a ranking as mechanic ahead of any apprentice who completed his apprenticeship before March 15, 1942, and therefore did not receive the benefit of the one year prior dating provision.
>
> Accepted for System Federation No. 103:
>
> (S.) JOHN RIEBER,
> *Secretary.*
>
> Accepted for Management:
>
> (S.) L. W. HORNING,
> *Manager, Personnel.*
>
> JANUARY 27, 1943.

In the railroad industry similar agreements are in effect on the New Haven, the Great Northern, the Boston & Maine, the Union Pacific, the Santa Fe, the Pennsylvania and the Missouri Pacific, among the major railroads. (These agreements, including the agreement quoted, are on file as a matter of public record with the National Mediation Board, pursuant to the requirements of Section 5, third (e) of the Railway Labor Act, as amended, 48 Stat. 1195, 45 U.S.C. 155.) This gearing of reemploy-

Unions and employers are not free to bargain collectively to give the veterans less than this. Respondents have urged that under *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, and *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, any provisions of a collective bargaining agreement are binding on the veterans if the agreement was made in good faith rather than in hostility to veterans; and from this respondents conclude that the veteran's seniority here must be established in the order he completed the promotion requirement, even though he would have completed it earlier but for his military absence. But no such conclusion can be drawn from *Campbell* and *Huffman*, for the key to both those decisions is that the veterans would have been in exactly the same positions had they never been in military service. Only where this is the case are the veterans bound by the agreement, as the explicit reliance on the "continuous employment" test in those decisions shows.[4]

Petitioner does not seek to upset the seniority system created by the railroad and the union. He takes that system as it exists, and recognizes its application to him. He contends only that the statute adds to the contractual system the requirement that the rules of that system be applied to the veterans in a manner which will give them the position they would have achieved *under those rules* had military service not interrupted their employment.

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ment rights of veterans to existing collective bargaining systems is also found in the oil industry, the auto industry, and the steel industry. In all of these areas, it has been recognized that seniority is a crucial incident of employment and that preservation of the right is due, in all fairness, to a veteran, not only as a veteran, but as a returning employee within the protection of the collective bargaining system.

[4] Petitioner does not contend that military service must be counted as time on the job, where actual work is required for advancement. Where such a requirement is imposed, the veteran must meet it to the same extent as non-veterans (petitioner has done so), and military service does not afford him any more favored treatment in this respect. This is what is meant by the statement in *Campbell* that the veteran "is not to be favored as a furloughed employee as against his fellows" (337 U.S. at 526), on which respondents so heavily rely.

Once the veteran has established his qualification or eligibility for advancement (here, by completing the work experience requirement after military service), the position he must be given in order to avoid discrimination is simply a factual question, to be determined by proof in the same manner as any other factual question. As the respondent railroad put it in its brief opposing the petition (p. 7, 2d par.), "a veteran must be able to point with reasonable certainty to a step on the escalator" which he would have reached had he remained continuously employed. Since there is agreement here as to the date petitioner would have completed the work requirement but for his military service, he is clearly entitled to seniority ahead of all who completed the requirement at a later date, even though these latter may have completed it earlier than petitioner did.

II

Merely According Veterans Equality With Those "On Furlough or Leave of Absence," With Respect to the Terms and Conditions of Their Employment When They Return, Does Not Satisfy the Statute.

The court below held that "there is a very palpable difference between 'furlough' and 'leave of absence' and 'continuous employment,' " that the two are "irreconcilable" and that the "leave of absence" standard is controlling. It held that since Diehl had been given the same position he would have achieved had he been on leave of absence instead of in military service, the statute was satisfied. Accordingly, it concluded Diehl was not entitled to seniority ahead of the four non-veterans who had jumped over him on the roster because of his absence in military service.

If this view be correct, the statutory protection can be restricted or foreclosed by the union, employer, or both, through appropriate manipulation of the provisions re-

lating to those on non-military leaves of absence—a group neither so numerous, nor absent so long, as the veterans. This prospect is not an imaginary evil, for it was precisely the contention made by Mr. Lyman (counsel for the union here) in behalf of the union in *Oakley* (Union br. in Oakley, p. 18). In fact, over one third of counsel's argument in *Oakley* (i.e. pp. 32-46 of his brief there) was devoted to pressing the "leave of absence" standard on this Court. The union's own argument (brief in opp. to petition, p. 9) that *Oakley* chose the "continuous employment" standard, in preference to either the "leave of absence" standard, or the "on the job" standard urged by the Government,[5] demonstrates clearly the repudiation of the "leave of absence" theory. The rejection was decisive, for the difference is not merely of terminology but of substance, since the "continuous employment" test gave Oakley and Haynes, and will give Diehl here, what they demanded, and the "leave of absence" theory does not.[6]

While *Oakley* thus would seem plainly to dispose of the issue here, the event proved otherwise. This Court's *Oakley* decision was followed by the action of the district

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[5] Whatever phraseology Government attorneys may have used, their position was the same as that of Diehl here. Oakley and Haynes demanded exactly what Diehl claims, and they were held entitled to it. (*Supra*, p. 8)

[6] Some Circuits (see *Addison* v. *Tennessee C. & I. Co.*, 204 F.2d 340 (C.A. 5) and *Raulins* v. *Memphis Union Station*, 168 F.2d 466 (C.A. 6)) have stated an alternative to the "leave of absence" theory, namely, that the Act gives the veteran an advantage beyond what is given those on leave, but only if the veteran has a contractual right to it. This theory is meaningless, since if the contractual right existed, there would be no occasion for invoking the statute. An issue arises only when, as in the present case, the contract (or custom, policy, or whatever else stands in its place) does not give the veteran the advantage. This theory was also urged, and rejected, in *Oakley* (Union brief there, p. 21); and again counsel urged, what was again rebuffed, that the union and employer could control and limit the scope of the statute, in that any protection the veteran had after the first year of reemployment was merely a contractual right, terminable at will in accordance with any modification in the collective bargaining agreement. (Union br. in *Oakley*, pp. 22-23)

court on the remand (19 CCH Labor Cases, par. 66,132) denying Oakley's claim on the "leave of absence" theory. The Sixth Circuit then decided *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856, on this ground; and following the denial of certiorari there (343 U. S. 903) the Fifth Circuit (in *Addison* v. *Tennessee C. & I. Co.*, 204 F. 2d 340) and the Fourth (in *Bostian* v. *Seaboard Airline R. Co.*, 211 F. 2d 867) rejected the "continuous employment" test in favor of the "leave of absence" rule. The Third Circuit in the present case frankly repudiated this Court's views. The Fourth did not consider them worth passing mention. Since these cases were identical in all material respects, a thorough and final refutation of the "leave of absence" theory seems appropriate.

By holding that the statute is satisfied so long as the veteran is treated no worse than those on leave of absence, the court below extracted the "furlough or leave of absence" clause from its context in the statute, and construed it to define and limit the entire protection of the statute. In doing so, it not only rejected the decisions of this Court but also shut its eyes to the structure and language of the statute and its legislative history, which plainly indicate Congress had the same conception of the Act as this Court.

A. ***The structure and language of the Act require that the several clauses of 8(c) be considered as cumulative, and not limits on one another.***

Section 8(c) confers on veterans four rights: (1) to be "considered as having been on furlough or leave of absence;" (2) to be "restored without loss of seniority;" (3) to enjoy "other benefits" in accordance with rules for those "on furlough or leave of absence in effect • • • at the time such person was inducted;" and (4) not to "be discharged without cause within one year after such res-

toration." It will be noted that the phrase "furlough or leave of absence" appears twice.

Grammatically, none of these four clauses modifies another, or relates to the additional rights conferred by 8(b), the rights to be restored to the former position and to enjoy appropriate seniority, status, and pay. Rather, the four clauses of 8(c) are of coordinate importance, and cumulative rather than limiting in character. The language employed confirms the grammar; Section 8(c) is introduced by the phrase "any person who is restored to a position in accordance" with 8(b) "shall be" entitled to the four rights named in 8(c); "shall be" here means "shall *also* be," unless 8(b) and its guaranty of position, seniority, status and pay are mere surplusage. The use of "and" to connect the last right listed in 8(c) with the other three shows clearly that the rights are cumulative, and not mutually limiting, as the court below thought.

As a matter of logic, no other interpretation is possible. So *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, decided in holding that the "discharge without cause within one year" provision could not be construed separately from the other provisions to give the veteran superseniority during his first year of reemployment. For on many occasions, application of the clauses separately leads to conflicting results: if a collective bargaining agreement (or employer practice) provides that those on leave or furlough lose all or part of their seniority after an absence of, say, a month, how can the veteran be restored "without loss of seniority" and at the same time be "considered as having been on furlough or leave?" And if the job of a person on leave may be bid in by another, and persons returning from leave are limited to choosing jobs which are open, what becomes of the guaranty in 8(b) of the veteran's position, seniority, status and pay? And if one kind of leave, say sickness, is treated differently from another kind, say

education, which treatment should be given the veteran? (All these are provisions commonly found in collective bargaining agreements or employer policies.) Similar anomalies occur, of course, if other clauses in the statute are opposed to one another as mutual limitations.

These considerations suggest a fundamental vice in the conclusion below that the statute is satisfied if the veterans are never accorded worse treatment than those on furlough or leave of absence: It permits the statutory protection, which was meant only to insure treatment no worse, to be circumscribed at will by the employer or union through the adoption of appropriately restrictive rules for those on nonmilitary leave, a group whose leaves of absence are likely to be far less important in both number and length than military absences. In fact, of course, the fundamental and principal protection of the statute is found in 8(b), with its guaranty of the veteran's former "position, seniority, status and pay." The veteran is entitled to this as well as to each of the several specific advantages enumerated in 8(c).

That 8(c) complements rather than restricts 8(b) is shown by the separate mentions of the two subsections in 8(c), creating a right of action by the veteran for "failure to comply with the provisions of subsection (b) or subsection (c)." If the clauses of 8(c) are so separable that the application of any one of them exhausts the statute, then its protection would end with the first year of reemployment—precisely contrary to the main holding of this Court in *Oakley*.[7]

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[7] *Aeronautical Lodge* v. *Campbell*, upon which respondents largely rely to show that equality with those on leave of absence is all the Act requires, is no authority for any such conclusion, and was properly given no emphasis by the court below. The Court's observation that the veteran "is not to be favored as a furloughed employee as against his fellows" (337 U.S. at 526) means only that he is not entitled to "superseniority" and cannot substitute military service for a requirement of actual work on the job. See note 4, *supra*, p. 11.

B. *The legislative history shows that the first "furlough or leave of absence" clause does not limit or define the entire statutory protection.*

The history of the bills which became the Selective Service Act in their progressive evolution into the present form of the Act shows quite clearly that the veteran is entitled to *all* of the rights mentioned in the statute, that the clause "shall be considered as having been on furlough or leave of absence" was added to the other rights as an improvement in draftsmanship to afford broader and more definite protection, and that its meaning was understood to be the opposite of the limiting meaning ascribed to it by the court below. Those who molded this statute believed that insertion of the clause would in some cases confer rights that might otherwise be unprotected; they never considered that it was satisfied if the veterans were treated no worse than those on leave or furlough.

As originally introduced in the 76th Congress, neither S. J. Res. 286, which eventually became the National Guard Act, nor S. 4164 and H. R. 10132, which became the Selective Training and Service Act, contained any provision for reemployment of returning veterans. Such provision was first inserted by the Senate Committee on Military Affairs in its consideration of S. 4164, the first of the two measures to be proposed. From the tentative and amorphous statement that it is "the purpose and intent of the Congress that every man who is called from a job when inducted * * * ought to be reemployed in such job or an equally good one without loss of seniority * * * " (Committee Print No. 1, July 23, 1940) the provision evolved through an intermediate stage (Committee Print No. 4, July 27, 1940) into the broader and more definite guarantees that the veteran shall be restored to his "former position or to a position of like status and pay" and "shall be restored without loss of seniority, insurance participation or bene-

fits, or other benefits, and such person shall not be discharged from such position without cause within one year after such restoration" (Committee Print No. 5, July 31, 1940).

This last provision first reached the Senate floor in the National Guard bill, and was passed without change. 86 Cong. Rec. 10068. The House deleted the portion last quoted and inserted "seniority" in the first before "status and pay." H. Rep. No. 2847, 76th Cong., 3d Sess.; 86 Cong. Rec. 10437, 10448. In conference, the second portion was restored and the House addition of "seniority" was retained. H. Rep. No. 2874, 76th Cong., 3d Sess. The Chairman of the House Military Affairs Committee explained the additional references to seniority as intended to provide for restoration of the veteran to his place on the seniority escalator. 86 Cong. Rec. 10761. S. J. Res. 286 was passed by both houses with these changes. 86 Cong. Rec. 10759-10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858.

The above reemployment provisions were carried over into the selective service bill. 86 Cong. Rec. 10922-3. It will be noted that, in all these efforts to increase the veterans' protection and make it more certain, the clause "considered as having been on furlough or leave of absence," which the court below interpreted to limit the other rights conferred by the statute, had not yet appeared. This clause was then inserted by an amendment from the Senate floor, which rewrote Section 8(c) in its present form. This amendment the Chairman of the Military Affairs Committee described as follows (86 Cong. Rec. 10914):

> That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life.

The author of the amendment concurred in this view and stated that the committee professional staff considered it an improvement in language. *(Ibid.)* The National Guard Act was amended to conform with this change. Section 8(d) of the Selective Training and Service Act, 54 Stat. 891.

At this point, Section 8(b) guaranteeing the veteran his former "position," "seniority," "status" and "pay" was already in the bill; so were the other three clauses of 8(c), assuring him he would be restored "without loss of seniority," would enjoy "insurance and other benefits" and would be secure against "discharge without cause." As a further step in the constant effort of Congress to increase the protection of the veteran and make it more secure the "considered as having been on furlough or leave of absence" clause was added. To say that this clause defines or limits the other rights granted, that the statute is satisfied if the veteran is given equality with those on leave of absence, would mean that Congress in one blind stroke destroyed the edifice it had so carefully and thoughtfully erected. It would mean using this clause, conceived as an instrument for adding to the protection of veterans, as a sword to cut them off from nearly all the statutory protection.

But it was not only in creating the statute that Congress showed clearly its protection is not limited to guaranteeing the veteran equality with those on leave of absence. Since then, Congress has inserted the "continuous employment" standard in the statute, and expressly approved the "escalator" principle, in precisely those words of the Court. For in enacting the Selective Service Act of 1948 (62 Stat. 604, 50 U. S. C. App. 459), Congress added Section 9(c)(2), which provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of

> subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

This paragraph in effect constitutes a legislative declaration of the meaning of the 1940 Act.[8] The Senate Report refers to this provision as a "statement of policy regarding application of the 'escalator principle'" (S. Rept. No. 1268, 80th Cong., 2nd Sess., p. 16). This statement of policy refers to Section 9(b) of the 1948 Act, which section is identical with Section 8(b) of the 1940 Act. Its identity was deliberate on the part of Congress, which was desirous of assuring that "no reemployment right should be granted to personnel serving under this [the 1948] legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 Act." S. Rept. No. 1268, 80th Cong., 2nd Sess., p. 15.[9]

Moreover, in connection with this ratification of the Court's decisions, Congress specifically asserted its under-

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[8] Cf. *United States* v. *Turner Turpentine Co.*, 111 F.2d 400, 404 (C.A. 5); *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *First National Bank* v. *Missouri*, 263 U.S. 640; *Tiger* v. *Western Investment Company*, 221 U.S. 286, 309; *Cope* v. *Cope*, 137 U.S. 682, 688; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331; *United States* v. *Freeman*, 3 How. 556, 564-565; *N.L.R.B.* v. *John W. Campbell*, 159 F.2d 184 (C.A. 5).

[9] Respondents argued below that the rejection in 1948 of the language in H. R. 6401, 80th Cong., 2d. Sess., that the veteran must have the advantage "to which he would have been entitled *had he been working for the employer* during his period of service in the armed forces" (emphasis added), in favor of the provision quoted in the text, constitutes a rejection of Diehl's claim. This action constituted a rejection of any "on the job" standard, of course, but that is not Diehl's claim. How the action amounts to a rejection of the "continuous employment" standard is somewhat obscure.

standing that the clauses of 8(c) were cumulative in their protection rather than mutually limiting, for it explained the reenacted section 8(c) of the 1940 Act as preserving

> certain benefits, incident to Federal or private employment, to which persons are restored after completion of service such as accumulated seniority rights and insurance benefits. *In addition*, the paragraph prohibits the individual's being discharged or laid off without cause within one year after restoration. (Emphasis added. S. Rep. 1268, 80th Cong., 2d Sess., p. 16.)

Thus, neither this Court nor Congress has found any "irreconcilability" between the continuous employment test and the first "leave of absence" clause. For both have accepted the statute as an "organic whole" and have refused to "tear clauses from their context." See *Trailmobile Co.* v. *Whirls*, 331 U. S. at 55. Since Oakley specifically held that the continuous employment standard applies to "all the terms and conditions" of the employment, there is no warrant for exalting this clause, or other single clause in the Act, to a position of exclusiveness or control over the others, whether in regard to promotion, vacation pay, seniority, or other conditions of employment. As respondent railroad said (brief in opp. to petition, p. 5), "no one statutory phrase can be emphasized to the exclusion of all others." There is no need to "reconcile" the continuous employment principle with the 'leave of absence" or any other clause, for the principle is itself the reconciliation (if any be needed) of all the clauses in the Act.[10]

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[10] Nor is there any need to explain to the Court the importance of the seniority rights which Diehl seeks. Prior decisions have shown the Court's understanding (1) that seniority may govern layoffs, the right to promotion, transfer to a more desirable job, pay rates, choice of shifts, vaca-

Conclusion

For the foregoing reasons, the decision below should be reversed, the "leave of absence" theory explicitly rejected, and the cause remanded for restoration of Diehl to a position on the seniority list ahead of the non-veterans who moved ahead of him because of his absence in military service.

Respectfully submitted,

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tion or pension benefits, or any of the countless incidents which make up the employment status; and (2) that seniority rights are not exhausted upon restoration to work in accordance with the statute, but become effective and operate on any subsequent occasion when seniority may determine the conditions of employment.

APPENDIX

The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 308, are as follows:

(a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3(b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department; Provided, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of Navy would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization con-

tinuing after discharge for a period of not more than one year.

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with

such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

The Selective Service Act of 1948 (renamed the Universal Military Training and Service Act in 1951) is identical to the above statute except for additions not material here. The subsection enacting the "continuous employment" standard is Section 9(c)(2), 62 Stat. 615, 50 U. S. C. App. 459(c)(2), and is as follows:

(2) It is hereby declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.